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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1221

INDUSTRIAL EMPLOYERS AND DISTRIBUTORS ASSOCIATION, AND BIRD & SON, INC. OF MASS.,

Petitioners,

v.

EARL J. SMITH,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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v.

EARL J. SMITH,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners Industrial Employers and Distributors Association and Bird & Son, Inc. of Mass., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Earl J. Smith v. Industrial Employers and Distributors Association and Bird and Son of Massachusetts, Inc.*, No. 75-1327 and No. 75-1333 below.

OPINIONS BELOW

The opinion and order amending opinion of the Court of Appeals, not yet reported, are set forth in Appendices A and B hereto. The opinion of the District Court is reported at 385 F.Supp. 1281 (N.D.Cal. 1974) and is set forth in Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1976. A timely petition for rehearing was filed on December 6, 1976. An Order Amending Opinion was entered on January 26, 1977, and the petition for rehearing was denied on February 2, 1977.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. The District Court had jurisdiction under The Selective Service Act of 1948, Pub.L. No. 80-759, § 9(d), 62 Stat. 616 (50 U.S.C. App. § 459(d)), reenacted by the Vietnam Veterans' Readjustment Assistance Act, Pub.L. No. 93-508, Title IV, § 404(a), 88 Stat. 1596 (38 U.S.C. § 2022).

QUESTION PRESENTED

Do the seniority provisions of the Military Selective Service Act require military service to be credited in computing the amount of retirement income under privately funded pension plans even though under such pension plans the amount of retirement income is dependent upon a substantial work requirement?

STATUTE INVOLVED

Section 9 of the Selective Service Act of 1948, 62 Stat. 614 (50 U.S.C.App. § 459), as amended,[1] provides in pertinent part:

"(b) *Reemployment rights*

In the case of any such person who, in order to perform such training and service, has left or leaves a position . . . and . . . makes application for reemployment within ninety days after he is relieved from such training and service . . .—

* * *

1. These provisions were reenacted by The Vietnam Veterans' Readjustment Assistance Act of 1974, Pub.L. No. 93-508, Title IV, § 404(a), 88 Stat. 1594 (38 U.S.C. § 2021).

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer . . . to such position or to a position of like seniority, status, and pay;

* * *

(c) *Service considered as furlough or leave of absence*

(1) Any person who is restored to a position in accordance with the provisions of paragraph . . . (B) of subsection (b) . . . shall be considered as having been on a furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employes on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph . . . (B) of subsection (b) . . . should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his restoration to such employment."

STATEMENT OF THE CASE[2]

A. The Basic Facts.

Respondent Earl J. Smith began working full time for Pabco Products, Inc. in March 1930. He worked continuously for Pabco until he was drafted into the United States Army in December 1942. Upon discharge from the Army in November 1945, he resumed work for Pabco and worked continuously for it and its successor, petitioner Bird & Son, Inc. of Mass. until his retirement in November 1970.

2. The facts are taken from the opinions below and are uncontroverted.

In June 1956 petitioner Industrial Employers and Distributors Association (IEDA), an employer association of which Pabco was and Bird & Son is a member, negotiated a pension agreement with Locals 6 and 17, International Longshoremen's & Warehousemen's Union. A copy of that Agreement is set forth in Appendix D hereto. Smith was a member of Local 6 and hence a beneficiary of the pension agreement.

The pension agreement requires the concurrence of two factors for pension payments. They are (1) years of continuous service, which determine eligibility, and (2) years of credited service, which determine the amount of the benefit. Thus a retiree, as Smith, may have years of continuous service which are not "credited years". The agreement provides for benefits for services after June 1956, the date of the first agreement, and also for services performed before that date (see Section 6A of the Agreement, Appendix D, page 28, and Section 6B, Appendix D, page 29).

The agreement provides that an employee, in order to be eligible for a pension, must be in the continuous service of a covered employer and that any break in such service in excess of 24 months will cause the employee to lose all previously accumulated credited service. Absence due to military service is not treated as a break in service. An employee so absent does not lose his previously accumulated credited service and continues to accrue "continuous service" (but not benefits) (Section 7C of the Agreement, Appendix D, page 36).

An employee in continuous service is entitled to pension *benefits* for each year of covered employment ("credited service") prior to June 1956[3] for a maximum of 35 years immediately preceding his retirement or the period commencing with his 30th birthday, whichever is longer. A "year of covered employment" is defined—as to past service—as any year prior to June 1, 1956 in which the

3. Pension credit for service performed after May 31, 1956 is not in issue here.

employee received full vacation benefits; at the time in issue (1942-1945) full vacation benefits were conditioned upon 1500 hours' work per annum (see Section 7A of the Agreement, Appendix D, page 34).

When Smith retired he was given pension *credits* from November 1935 (when he reached 30) to November 1970 (the date of his retirement), the time spent in the military being credited as "continuous service" time, but he was denied any pension *benefits* for the 34 months spent in military service,[4] because during that period he had not fulfilled the Plan's requirement of 1500 hours of service.

And so Smith brought his suit.

B. Proceedings in the Courts Below.

Since no facts were in dispute, cross-motions for summary judgment were filed in the District Court. The District Court held for respondent Smith. Its judgment was based upon the reasoning that the "true nature of pension benefits" is compensation to employees for loss of their jobs, and that pension benefits reward length of service rather than amount of work performed, and are thus perquisites of seniority (see District Court's opinion, 385 F.Supp. at 1286, or Appendix C, page 18).

The Court of Appeals rejected this theory but affirmed on different reasoning. It held that a returning veteran is not entitled to pension benefits for the time served in the military after the establishment of the plan in June 1956, but that the veteran is entitled to benefits based on time in the military served before the plan was adopted. It purported to find a distinction that benefits for time subsequent to adoption of the plan are consideration for which the union bargained and the employee works, but that bene-

4. The denial of credit for 34 months of military service reduces Smith's monthly pension benefits by $17.71 from January 1, 1971 to December 31, 1973 and $23.39 per month from January 1, 1974 to the present.

fits for time prior to adoption of the plan are not deferred pay for work performed but a "reward" for length of continuous service (see Court of Appeals' opinion, Appendix A, pages 7 and 8, and order amending opinion, Appendix B, page 10.)

REASONS FOR GRANTING THE WRIT

There are four reasons for granting the writ.

1. On January 10, 1977, this Court granted certiorari in *Alabama Power Company v. Raymond E. Davis,* Sup.Ct. No. 76-451, upon the identical issue presented here.

2. The judgment below is in conflict with the teaching of this Court in *Foster v. Dravo Corp.,* 420 U.S. 92 (1975).

3. The judgment below is in conflict with the decisions of the Court of Appeals for the Third Circuit in *Litwicki v. Pittsburgh Plate Glass Ind., Inc.* 505 F.2d 189 (1974), and the Court of Appeals for the Tenth Circuit in *Jackson v. Beech Aircraft Corp.,* 517 F.2d 1322 (1975).

4. The decision undermines the collective bargaining process and substitutes the courts for the parties to the collective bargaining.

A. Alabama Power Company v. Raymond E. Davis, No. 76-451, in Which Certiorari Was Granted, May Not Preserve the Issue Here; This Case Has Been Decided Contrary to the Teaching of Dravo; the Circuits Are in Conflict.

On January 10, 1977, the Court granted certiorari in *Alabama Power Company v. Raymond E. Davis,* No. 76-451, in which the question stated in that petition is in the identical words of the question stated at page 2 above. However, there is the possibility that the question may drop out of the *Alabama Power* case. There, the decision in the district court, 383 F.Supp. 880 (N.D.Ala. 1974) affirmed *per curiam* without opinion by the Fifth Circuit,[5] was

5. Except for a dissent.

based upon a finding that the pension benefits under the plan were not based upon the *amount of work actually performed* but upon total time of employment. The district court held, 383 F.Supp. at 889:

> "This court is of the considered opinion that, as has previously been pointed out, there is no evidence in this case to show that the pension plan is based upon any 'unit of work' requirement."

Should this characterization of the pension agreement by the district court in *Alabama Power,* that it contained no work requirement, be sustained, the question stated in the petition there, resting upon the presence of a substantial work requirement, could not be resolved in that case. But it is uncontroverted that the pension agreement in this case does contain a substantial work requirement. The court below specifically held (Appendix A at page 3, fn. 4):

"It is undisputed that the work requirement is substantial."

In *Foster v. Dravo Corp.,* 420 U.S. 92 (1975) the question was whether 50 U.S.C. App. § 459 entitled a veteran to vacation benefits when, because of his departure for military service, he failed to satisfy a substantial work requirement upon which the vacation benefits were conditioned. The Court noted (p. 97) that:

> ". . . where the claimed benefit requires more than simple continued status as an employee, the Court has held that it is not protected by the statute."

The Court held (pp. 99-100):

> "Generally, the presence of a work requirement is strong evidence that the benefit in question was intended as a form of compensation. Of course, as in the Accardi case, the work requirement may be so insubstantial that it appears plainly designed to measure time on the payroll rather than hours on the job; in that event, the Act requires that the benefit be

granted to returning veterans. But where the work requirement constitutes a bona fide effort to compensate for work actually performed, the fact that it correlates only loosely with the benefit is not enough to invoke the statutory guarantee."

The teaching of *Foster* is that the particular pension agreement must be examined to determine whether the benefit is measured by time on the payroll or is a bona fide effort to compensate for work actually performed. If under the agreement it is the former, then it is a perquisite of seniority and protected by the statute; if the latter, it is not protected.

The anomaly of the decision below is that it holds that the pension benefits were measured by time on the payroll although the pension agreement contains a substantial work requirement. In so holding, the decision conflicts with the teaching of *Foster* and with decisions of the Third and Tenth Circuits that applied the standard used by this Court in *Foster*. *Litwicki v. Pittsburgh Plate Glass Indus., Inc.*, 505 F.2d 189 (3d Cir. 1974) and *Jackson v. Beech Aircraft Corp.*, 517 F.2d 1322 (10th Cir. 1975). In the *Litwicki* case, supra, 505 F.2d at 193, the court said:

> "Our analysis of this pension agreement leads us to the firm conclusion that the benefits therein provided are not perquisites of seniority under the Act. These pension benefits essentially are deferred compensation based upon a substantial work requirement. Thus we hold that, neither for purposes of vesting nor for purposes of calculating amount of pension benefits, does the Act require that credit be given for military service."

In *Jackson*, supra, 517 F.2d at 1325, where as here, the facts were undisputed, the court observed:

> ". . . we are of necessity limited to an examination of the agreements from which the benefits arise in our effort to ascertain their true nature. In this regard there is little doubt but that the benefits here involved are in each instance tied to actual work time, and not mere length of service. The amount of retirement income benefits under the 1969 Plan, as amended, is to be computed on the basis of years of actual work."

So finding, the Tenth Circuit held (517 F.2d at 1326):

> ". . . we . . . are of the view that the retirement income benefits provided by the plan are not a form of seniority, as such, but are based on a substantial work requirement. Accordingly, we hold that the Act does not require that Jackson and Tolbert be given credit for time spent in the military in computing the amount of their retirement benefits."

In the present case, the court below, like the Courts of Appeals for the Third and Tenth Circuits, found that the retirement income benefits provided for under the pension agreement are based upon a substantial work requirement, but unlike those courts, held that the pension benefits were perquisites of seniority. This conflict must be resolved.

B. The Decision Below Undermines the Collective Bargaining Process by Substituting the Courts for the Parties to the Collective Bargaining.

The decision below rests on reasoning that might be appropriate to a philosophical discussion but is foreign to the modes of thought and interests of those engaged in collective bargaining.

Seniority rights do not exist in the abstract or because of the Military Selective Service Act. They exist only as they are created by the collective bargaining process. The statute preserves seniority rights while in military service, but it does not create seniority rights. Whether a particular benefit is a perquisite of seniority is controlled not by the statute but solely by the language of the collective bargaining agreement. It is the agreement, and the

agreement alone, that tells one whether a particular benefit is based upon simple length of service (seniority) or on a substantial work requirement.[6]

When an action is brought under the statute, the court's task is not to rewrite an employer-employee agreement so as to comply with some statutory requirement about what benefits should be given to seniority. There are no such statutory requirements. The court's task is only to ascertain from the language of the agreement whether that agreement bases the benefit upon length of time employed (seniority) or upon actual work performed.

When respondent Smith entered military service in 1942 and when he returned in 1946 he had no pension rights, and the statute gave him none. He had none until they were created in 1956 by the collective bargaining agreement. The statute did not require the agreement to give an employee credit for past service. The parties to the agreement negotiated to credit service in past years, but only for the past years during which the employee received full vacation benefits under the applicable collective bargaining agreement or for hours, up to 1730, actually worked in any year when he did not receive full vacation benefits, and all this contingent on a specified number of years of continuous service. By virtue of the Military Service Act, the years in military service are not deemed to break the continuity of employment. But the Act does not deem hours not worked as hours worked or eliminate the provisions of the plan that benefits are measured by hours worked.

The court below went beyond its proper task. In deciding whether past service credits are payments for past services rendered, as petitioners contend, it concluded upon an unnecessary analysis that they are not, which, while subtle enough, is based upon erroneous assumptions. And whether they are or are not,

6. Setting aside, of course, a sham requirement. It is plain enough that the requirement here is genuine.

the court has rewritten the pension agreement and has thus invaded the area of collective bargaining. In so doing it has given one of the parties (the union) more than it could obtain by negotiation and the other (IEDA) less than it did obtain.

To permit the decision of the Ninth Circuit to stand uncorrected is to invite courts to rewrite collective bargaining agreements and pension agreements. To so permit is to solicit as much chaos and confusion as was released by the daughter of Hephaestus. No longer can employers, employees, labor unions and pension plan administrators rely upon the clear language of their agreements. No longer will collective bargaining agreements mean what they say. Litigation will proliferate. The Solicitor General in his brief urging this Court to hear *Alabama Power* has mentioned a minimum of 46 pending cases.

CONCLUSION

We respectfully submit that the petition should be granted.

Dated: San Francisco, California, March 3, 1977.

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(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Earl J. Smith,

Plaintiff-Appellee,

vs.

Industrial Employers and
Distributors Association;
and Bird and Son of
Massachusetts, Inc.,

Defendants-Appellants.

No. 75-1327
No. 75-1333

OPINION

[November 23, 1976]

Appeal from the United States District Court
for the Northern District of California

Before: DUNIWAY and GOODWIN, Circuit Judges,
and LUCAS,* District Judge

DUNIWAY, Circuit Judge:

Industrial Employers and Distributors Association (IEDA) and Bird and Son, defendants below, appeal from a summary judgment in favor of Smith, plaintiff below. The district court held pensions to be "perquisites of seniority" under 38 U.S.C. § 2021 (b) (1), formerly 50 U.S.C. App. § 459(b) (B) (i), and permitted

*The Honorable Malcolm M. Lucas, United States District Judge for the Central District of California, sitting by designation.

Smith, a veteran, to include the time he spent in the Armed Services in computing the amount of his pension. While our analysis differs from that of the district court, we agree with its conclusion and affirm.

I. FACTS.

Smith began working for Pabco Products in March, 1930. He worked without interruption until his induction into the United States Army in December of 1942. In October, 1945, Smith received an honorable discharge and asked Pabco to reemploy him. A strike delayed his reinstatement until March of 1946. Except for three months during two strikes, Smith was continuously employed by Pabco—or by Bird, which acquired Pabco in 1968—until his retirement at the end of 1970, when he became eligible to draw pension benefits.

The pension plan at issue here was established in June, 1956, by a Collective Bargaining Agreement between the International Longshoremen's and Warehousemen's Union and the Distributors Association of Northern California, of which Pabco was and Bird is a member.[1] Although certain provisions have been modified to provide greater benefits to recipients, the plan's contours remain basically unchanged.

Benefits:

The size of an employee's monthly pension is calculated by multiplying a monetary coefficient determined by the Union and IEDA (currently $8.25) by the number of years of credited service. This latter factor contains two different components, future service and past service. In calculating benefits the plan counts units of past and future service equally. However, the provisions governing accumulation are quite different.

1. The Union designated defendant IEDA to administer the plan.

Future Service:

An employee received 1/12th of a future service credit in any month commencing after May 31, 1956, if:

(1) he is employed on the 20th of that month by a covered employer (a signatory to the pension agreement);
(2) he has been employed continuously for 30 calendar days preceding the 20th; and
(3) his employer has made his monthly contribution to the pension fund in an amount determined by the Collective Bargaining Agreement.

Past Service:

The plan also grants past service (pre-plan) credit for work performed within 35[2] years of the date on which the employee retires if:

(1) he was over 30[3] when he performed the work;
(2) he was eligible for a vacation[4] during the corresponding calendar year; and
(3) the establishment in which the past service was performed became covered by the pension plan no later than December 31, 1956.

The plan specifically denies credit, past or future, for time spent in the military.

Financing:

The plan is totally funded by employer contributions. An employer is liable for an amount established in the Collective Bargaining Agreement for each month of future credited service

2. The number was 25 before 1970.

3. The age cutoff was 40 before 1970.

4. It is unclear whether 1,500 or 1,730 hours of work were required for eligibility for a vacation during the years (1942-45) in question. It is undisputed that the work requirement was substantial.

accumulated by a covered employee (currently $77.85). He bears no responsibility for extinguishing the liability created by unfunded past service credit.

When Earl Smith retired at the end of 1970, he received 14-3/12 units of future service credit,[5] an amount that he concedes is correct, and 17-6/12 units of past service credit. This figure represents only the time when he was on Pabco's payroll, from November, 1935 (when he turned 30), until June of 1956, and excludes the 34 months that he spent in the Armed Services. The problem we face is whether § 8(b) of the Selective Service and Training Act of 1940, 54 Stat. 885, 890, now codified at 38 U.S.C. § 2021, requires the inclusion of those 34 months in Smith's past credited service.

II. DECISIONAL FRAMEWORK.

The statute with which we deal, as noted above, was enacted in 1940.[6] At that time Congress was concerned principally with the

5. This includes the entire 174-month period commencing June 1, 1956, and ending November 30, 1970, the month in which Smith turned 65, except for three months in 1959 and 1967 when the Union was on strike.

6. The pertinent language of the 1940 statute is:

> "(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, . . . in the employ of any employer and who . . . (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forth days after he is relieved from such training and service—
>
> * * * *
>
> (B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;
>
> * * * *
>
> (c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval

growing danger of world war, and not with the distant problems of demobilization. Section 8 was, in the words of a contemporary commentator, an afterthought. *See* Comment, *Veterans' Reemployment Rights Under Selective Service Interpretations,* 54 Yale L.J. 417, 418-19 n.8 (1945). It is not surprising that the statute is ambiguous, guaranteeing returning veterans against any loss of seniority without defining what seniority is. At least two sensible interpretations are possible. Congress may have intended to restore the veteran to the same relative seniority that he held before induction vis-a-vis fellow employees who did not serve in the Armed Forces, implicitly counting time in uniform as time on the job. On the other hand, the language might as easily be read as protecting only against the forfeiture of absolute seniority accumulated before induction. *See* Haggard, *Veterans' Reemployment Rights and the "Escalator Principle"*, 51 B.U.L. Rev. 539, 541-44 (1971).

The Supreme Court first faced this problem in *Fishgold v. Sullivan Drydock & Repair Corp.*, 1946, 328 U.S. 275 where Mr. Justice Douglas chose the first alternative:

> [The veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. 328 U.S. at 284-85.

However, in answering one question, the Court created a second: What is seniority? In *Accardi v. Pennsylvania R.R. Co.*, 1966, 383 U.S. 225, Mr. Justice Black attempted this explanation:

> The term "seniority" is not to be limited by a narrow, techical definition but must be given a meaning that is consonant

forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces,. . . ." 54 Stat. 890

> with the intention of Congress as expressed in the 1940 Act. That intention was to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country. 383 U.S. at 229-30.

In general, then, we may define seniority benefits as those which reward longevity, not those which compensate for work actually performed. *See also Foster v. Dravo Corp.*, 1975, 420 U.S. 92, 97; *Austin v. Sears, Roebuck & Co.*, 9 Cir., 1975, 504 F.2d 1033, 1035.

However, even the best definition is not a solution. It may be obvious that a physician who leaves an internship to serve in the Armed Forces is not entitled to return as head resident, but most of the problems which courts have confronted are not as easily solved. *Cf. Earls v. Atchison, Topeka and Santa Fe Ry.*, 9 Cir., 1976, 532 F.2d 133. The statute assumes that there exists a distinct line between rewards for status and compensation for work. In reality many benefits combine the two; they recompense employees for both status and work. These hybrids are out of place in a system which recognizes only purebreds. Hence, we must "unmix" the benefit in a way never foreseen by the contracting parties or the Congress, to determine which characteristics trace their lineage to seniority. *Accardi, supra*, 383 U.S. 229-31; Haggard, *Veterans' Reemployment Rights and the "Escalator Principle"*, 51 B.U.L. Rev. at 577.

III. ANALYSIS.

The defendant argues persuasively that pensions generally are a form of deferred compensation, and not "perquisites of seniority" protected by the Act. *See Inland Steel Co. v. NLRB*, 7 Cir., 1948, 170 F.2d 247, 251-55, *cert. denied in part*, 1949, 336 U.S. 960, *Affirmed on other ground sub nom. American Communications Assn. v. Douds*, 1950, 339 U.S. 382. The plaintiffs and the district court disagree, conceptualizing pension benefits as what an employee received in exchange for surrendering his "job and its concomitant seniority rights." 385 F. Supp. 1281, 1286. Both arguments miss the point, and place undue emphasis on the parties' imprecise "labels and definitions" to define "rights guaranteed by the Act." *Accardi, supra*, 383 U.S. 229; *Litwicki v. Pittsburgh Plate Glass Industries*, 3 Cir., 1974, 505 F.2d 189, 192.

The general function of pension benefits in late-20th century America is not in issue. We are concerned solely with analyzing the benefits provided by the specific plan that is before us. *See Palmarozzo v. Coca-Cola Bottling Co.*, 2 Cir., 1973, 490 F.2d 586, 595-96 n.2 (Friendly, J., dissenting), *cert. denied*, 1974, 417 U.S. 955. Applying this method of the case before us, the way in which we must diagnose the pension plan is clear. The plan rests upon two types of service—future and past—and it is essential to analyze each separately.

Future service is work performed after June 1, 1956, the date the pension plan was inaugurated. Beginning with that date, an employee could logically consider his salary to be composed of two parts—present payment (wages) and future rights (pension). Unquestionably, both represent consideration for which the union bargained, and consideration for which the employee works. Had Smith served in the Armed Forces after June, 1956, 38 U.S.C. § 2021 would entitle him neither to pension credits nor wages for the period spent in uniform.[7] *See Foster v. Dravo Corp., supra; Austin v. Sears, Roebuck & Co., supra.*

The true nature of pension benefits based on past credited service is more difficult to discover. As a first approximation, it is probably correct to label them compensation. Payments, direct or

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7. This was precisely the factual situation which faced the Third Circuit in *Litwicki, supra*. It is not clear whether it is also identical to the problem resolved by the Tenth Circuit in *Jackson v. Beech Aircraft Corp.*, 10 Cir., 1975, 517 F.2d 1322. In any event we perceive no explicit conflict between this opinion and *Jackson*.

indirect, from employers to employees are normally not considered gifts. *Cf. Commissioner v. Duberstein,* 1960, 363 U.S. 278, 287. However, the question is not whether it was compensation, but what it was compensation for.[8]

IEDA argues that past service credits are payments for past service rendered. Semantically, this approach is attractive, but it requires analysis which we undertake in this example: Consider employee X who in 1943, 1944, and 1945 agrees not to withhold his services. He does so because his employer has offered him an ample package of rights that we may label his salary. Let us assume that each party fulfills his bargain and continues this arrangement until 1956. In that year X asks for a salary increase, which his employer believes is too large. X has only one way in which to press his demands—by withholding his labor from that day forward. He cannot undo work he has already performed. If the employer capitulates, he does so only to obtain future services. That the employment contract states that the employer is granting X an increase equal to $100 for each of the prior fifteen years of service does not transform the $1,500 to income earned in 1941-55. The money is earned in 1956. A past service factor appears in the salary equation, but as a constant, unchanging and unchangeable.

The situation here is analogous to that posed in the hypothetical, except that the payments do not flow directly from employer to employee. [They pass through an intermediary, the union-designated pension fund, whose distribution formula does not reward service to the employer, but membership in the union. The extra credits are really a largesse, the repayment of a "moral debt," which younger employees owe their elders. The gift is an expression of appreciation which assures those who built a strong union

8. As Winston Churchill is said to have remarked, the prohibition against ending a sentence with a preposition is "arrant pedantry up with which I will not put."

that they will not be forced into penury after retirement.[9]]* That past service credits are computed with reference to actual service does not alter our conclusion. In substance they are a benefit which "necessarily [has] accrued by virtue of continued employment [and which can]not be denied the veteran merely because of his absence in military service." *Foster v. Dravo Corp., supra,* 420 U.S. at 97. *Accord* U.S. Dept. of Labor, *Veterans' Reemployment Rights Handbook* 97 (1970). Preplan service credits reward longevity, not actual work on the job, and must be classified as perquisites of seniority. *See Austin v. Sears, Roebuck & Co., supra,* 504 F.2d at 1035.

The judgment of the district court is affirmed.

9. The Collective Bargaining Agreement mandates retirement at 65.

*On January 26, 1977, the bracketed sentences were ordered struck and new language substituted by the Court of Appeals. See Appendix B.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 75-1327
No. 75-1333

ORDER
AMENDING OPINION

Earl J. Smith,

Plaintiff-Appellee,

vs.

Industrial Employers and
Distributors Association;
and Bird and Son of
Massachusetts, Inc.,

Defendants-Appellants.

[January 26, 1977]

Before: DUNIWAY and GOODWIN, Circuit Judges,
and LUCAS, District Judge

The portion of the opinion, filed on November 23, 1976, appearing at page 7, line 30, of the typewritten opinion and continuing through page 8, line 6, of the typewritten opinion ending with the word "retirement" is stricken,* and in its place there is substituted the following:

> The amount of the payments—as well as the whole scheme—was not established until 1956, when the pension plan was established. Thus enhancement of the employee's future

*The portion of the opinion ordered stricken is at pages 8 and 9 of Appendix A and is enclosed in brackets.

> entitlement by reason of pre-1956 employment is not pay for that employment. It is a product of length of service, and hence, for the purpose of computing it, time spent in military service must be included. Otherwise, Smith will not have "step[ped] back on [the escalator] at the precise point he would have occupied had he kept his position continuously during the war." [*Fishgold, supra.*]

Footnote 9 to the opinion is also stricken.

Appendix C

United States District Court
Northern District of California

No. C-73-1533 WHO

OPINION AND ORDER

Earl J. Smith,

Plaintiff,

vs.

Industrial Employers and Distributors Association, a Corporation, and Bird and Son of Massachusetts, Inc., a Corporation,

Defendants.

[November 26, 1974]

Plaintiff, a World War II veteran, instituted this action under Section 9 of the Military Selective Service Act of 1967[1] (50

1. The Military Selective Service Act, 50 U.S.C. App. § 459 (1967) provides in pertinent part:

* * * * *

"(b) *Reemployment rights.*

"In the case of any such person who, in order to perform such training and service, has left or leaves a position * * * and * * * makes application for reemployment within ninety days after he is relieved from such training and service * * *

* * * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer * * * to such position or to a position of like seniority, status, and pay;

* * * * *

(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) * * * shall be considered as having been on a furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without the loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) * * * should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

* * * * *"

U.S.C. App. § 459) to obtain monetary credits under defendants' pension plan for his years of military service when he was absent from defendant's employment. There being no genuine issue as to any material fact, both plaintiff and defendants have moved for summary judgment. Plaintiff contends that pension benefits are perquisites of seniority which are due him by right under the Act. Defendants contend that the returning veteran is not entitled to pension credits for his years of military service under the particular terms of their pension plan which requires 1,730 hours of work per year before pension credit may be obtained for the year. Additionally, defendants claim that plaintiff's action is barred by laches. The important question presented to the Court is whether pension benefits requiring a specific number of work hours per year are "perquisites of seniority" as defined in the leading cases construing the Act or "other benefits" as the term is used in the Act (50 U.S.C. App. § 459(c)(1)).

I. FACTS

Plaintiff Smith was first employed by Pabco Products, Inc., on March 11, 1930. He worked continuously for Pabco until he was drafted into the Armed Forces of the United States in December,

1942. Mr. Smith was honorably discharged in November, 1945. Within one week of his discharge, he requested reinstatement with Pabco. Due to a strike then in progress against the company, Smith was not reinstated until March 18, 1946.

In June, 1956, defendant Industrial Employers and Distributors Association, an employer association of which Pabco was a member, instituted a pension agreement on behalf of its members. At the time the plan was executed, employees only received pension credit for employment rendered subsequent to 1956. Mr. Smith's military service ended in 1945; hence, he was not eligible for pension credit for his years in the military under the initial terms of the plan. In 1968, defendant Bird and Son purchased the assets of Pabco and assumed Pabco's obligations under the pension plan. Mr. Smith continued to work as an employee of Bird and Son.

Through the years the pension plan was amended several times. In 1970, the plan was amended to allow employees pension credits back to their 30th birthday. Mr. Smith served in the Armed Forces from age 37 to 40. It was not until the 1970 amendment that his years of military service qualified for pension credits under the age requirements of the plan. On November 18, 1970, Mr. Smith's 65th birthday, and the day on which he planned to retire, Mr. Smith was denied pension credits for his 34 months of military service despite the 1970 amendments to the pension plan. The denial was based on the specific terms of the pension plan which deny credits for absence due to military service[2] and

2. Section 7C of defendants' pension plan provides:
"Break in Service
* * * * *
Absence from employment while on active duty in any military service of the United States, for which re-employment rights are accorded by act of Congress * * * shall not constitute unemployment or a break in continuous service, but no credit shall be allowed for such service."

require actual work of 1,730 hours per year for time to be credited toward pension benefits.[3] The denial of credit for Mr. Smith's 24 months of military service resulted in a reduction of his monthly pension benefits by $17.71 per month from January 1, 1971, to December 31, 1973, and $23.39 per month from January 1, 1974, to the present.

II. ISSUES

The two main issues before the Court are whether pension benefits based on a specific number of work hours per year are

3. Section 7A of defendants' pension plan provides:
"Credited Past Service.
Subject to the conditions stated in Section 6, subsection B, one (1) full year of past service credit shall be credited to an employee for each full year of covered employment rendered during the longer of the following and prior to June 1, 1956:
(i) The period comprising the thirty-five (35) years next preceding the mployee's automatic retirement date (for employees who retired on or before May 31, 1970, the period comprising the twenty-five (25) years next preceding the employee's automatic retirement date).
(ii) The period commencing with the employee's thirtieth (30th) birthday (for employees who retired on or before May 31, 1970, the period commencing with the employee's fortieth (40th) birthday).
A full year of covered employment for past service shall mean any year prior to June 1, 1956, for which a covered employee received full vacation benefits (pursuant to the applicable collective bargaining agreement between his Employer and Local 6 or Local 17, ILWU) for work performed in a covered establishment; provided, that the hours worked by a covered employee in a covered establishment during any year prior to June 1, 1956, for which he failed to receive such full vacation benefits may be added to the hours worked by such employee in any other such year in which he also failed to receive such full vacation benefits, and a full year of past service credit will be allowed for each 1730 such hours; provided, further, however, that no more than 1730 hours worked in any one year may be counted for this purpose. Continuous service rendered in a covered establishment prior to its organization by Local 6 or Local 17, ILWU or their I.L.A. predecessors shall be counted for this purpose.
The past service credit of each employee as of May 31, 1956, has been jointly determined by the Association and the Union and a written record of such determination has been made."

"perquisites of seniority" or "other benefits", and whether plaintiff's claims are barred by laches.

A. *Characterization of Benefits*

Under Section 9 of the Act, if the benefits are seniority benefits, Mr. Smith is entitled to credit despite the work hour requirements. If the benefits are "other benefits", the defendants may validly impose limitations on eligibility, and Mr. Smith will be denied the benefits for failure to put in the actual work time.

The Act is clear that any person who, in order to serve in the Armed Forces of the United States, leaves a position in the employ of any private employer and who is honorably discharged and makes application for re-employment within 90 days after he is discharged:

> "if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of *like* seniority, status, and pay; * * *."
> (Emphasis added; 50 U.S.C. § 459(B)(i))

The term "seniority", although not defined in the Act, must be construed broadly in keeping with the protective purpose of the Act. *Accardi v. Pennsylvania R.R. Co.*, 383 U.S. 225 (1966). The Court has examined the legislative history of the 1967 and 1948 versions of the Military Selective Service Act (50 U.S.C. App. § 459) as well as the legislative history of its predecessor act, the Selective Training and Service Act of 1940 (54 Stat. 890), but has been unable to find a discussioin of precisely what rights Congress intended to classify as "seniority benefits" and what were to be "other benefits". In defining the term, the Court must therefore rely on the broad legislative intent behind the Act. The purpose of the Military Selective Service Act was to preserve for the returning veteran the employment benefits that he would have obtained by longevity of civilian service had his career not been interrupted by military service. S. Rep. 1268, 80th Cong., 2d Sess. (1948) at 16. This philosophy has been conceptualized by the escalator principle. The returning veteran steps back onto the moving escalator of terms and conditions of employment at the position he would have held had he remained in continued civilian employment. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946).

It is only quite recently that the World War II veterans whom the Act sought to protect have begun to reach retirement age and to litigate the question of pension benefits. This is the third case in the country to deal with a veteran's pension rights under the Act. Two other district courts have discussed the issue. In *Litwicki v. PPG Industries Inc.*, 72 L.C. 14, 101 (W.D. Pa. 1973), the court drew a distinction between the vesting of pension rights and the accumulation of credit for pension rights and denied the returning veteran pension credit where he had not actually fulfilled the work hour requirement. In *Davis v. Alabama Power Company*, 72-G-1123-S (E.D. Ala. September 11, 1974), the court invalidated a work hour requirement. The court looked to the true nature of pension benefits and to the particular work hour terms required by the plan. In my view, *Davis* is the better reasoned decision.

While no appellate decisions have dealt with the specific question of work hour requirements for pension benefits, there have been numerous decisions on the validity of work hour requirements for severance and vacation benefits under the Act. In *Accardi, supra*, the Court invalidated a work hour requirement that precluded veterans from obtaining severance benefits. Defendants argue that *Accardi* is inapposite since there the court was concerned with an obviously sham work requirement of 7 days per year that was aimed at denying seniority rights to veterans who would be unable to complete even this minimal work requirement. Defendants claim that 1730 work hours required by their plan is a far more substantial prerequisite to benefits and is,

therefore, a valid requirement under the Act. The Court does not agree with this narrow reading of *Accardi* or with the defendants' characterization of their work requirement.

The teaching of *Accardi* is that the Court must look to the real nature of the benefit to determine if it is a "perquisite of seniority". The Court must not let veterans be denied seniority rights because employers have redefined these rights in terms of work hours, rather than length of work. *Palmarozzo v. Coca-Cola Bottling Co. of New York*, 490 F.2d 586 (2d Cir. 1973). More recently, the Ninth Circuit has instructed the courts to carefully scrutinize any efforts to convert benefits that are traditionally determined by length of service into benefits that are tied to actual time on the job. *Austin v. Sears Roebuck and Co.*, No. 73-2704 (9th Cir. Oct. 21, 1974). In this Circuit, where employers have attempted to redefine seniority rights with benefit plans that are not strictly correlated with actual work performed, the work hour requirement has been invalidated. *Locaynia v. American Airlines*, 457 F.2d 1253 (1972).

In the opinion of the Court, the true nature of pension benefits is closely akin to that of severance benefits that were considered "perquisites of seniority" in *Accardi* and *Palmarozzo*. With pension benefits, as with severance benefits, an employee is being compensated for the loss of his job. With the former, he is voluntarily relinquishing his job; with the latter, involuntarily. In both instances, he is exchanging all other seniority benefits for this single termination benefit. It is only natural that compensation for this loss of job and its concomitant seniority rights should be based on length of service, not on the amount of work actually performed. *Palmarozzo v. Coca-Cola Bottling Co. of New York, supra.*

A close examination of defendants' pension plan reveals that although the "credited year" for pension benefits is defined by number of hours of service, it is really length of service rather than the amount of work performed that the plan rewards. For

example, if an employee works more than 1,730 hours per year, he does not receive any additional pension credits. The work hour requirement is actually another way of defining the length of time that must be worked for pension credits to accrue, albeit a substantial length of time. Time is exactly what seniority computation is based on. By redefining length of service in terms of hours rather than years, the defendants cannot change the character of pension benefits from seniority rights to some "other benefits".

Defendants rely primarily on the decisions in *Dugger v. Missouri Pacific Railroad Co.*, 276 F.Supp. 496 (S.D. Tex. 1967), *aff'd* 403 F.2d 719 (5th Cir. 1968); *Foster v. Dravo Corp.*, 490 F.2d 55 (3d Cir. 1973); *Kasmeier v. Chicago Rock Island & P.R.R.*, 437 F.2d 151 (10th Cir. 1971); and *Austin v. Sears Roebuck, supra*, where work hour requirements were upheld under the Act. These cases deal with vacation benefits and are not controlling on the question of pension benefits. Having characterized vacation benefits as rewards for a worker's current or short term labor (*Austin v. Sears Roebuck, supra*, at 6; *Foster v. Dravo, supra*, at 63), these courts reasonably treated the vacation rights as a function of actual labor performed and as "other benefits" under the Act. In contrast, severance and pension benefits give an employee long-term job security based on his length of service with an employer, not on the actual amount of work performed.

Defendants place particular emphasis on the Ninth Circuit's recent opinion in *Austin*. Not only did *Austin* deal with vacation benefits while the instant case deals with pension benefits, but the mechanics of computing benefits under the Sear's vacation plan that the court addressed in *Austin* were very different from those before the Court in the case at bar. In *Austin*, vacation benefits were upheld because they were closely correlated with the actual amount of work performed. Vacation benefits increased incrementally with each month of service. The court distinguished the *Austin* program from the benefit plan in *Locaynia v. Amer-*

ican Airlines, supra, where the work requirements did not correspond to incremental vacation increases and the work hour provisions were invalidated. Defendants' plan is more similar to the situation in *Locaynia*. The amount of pension benefits does not increase with the actual hours of work done. A flat 1,730 hours of work is required before any benefits accrue. No credit is given for additional hours worked. Moreover, in *Austin,* the returning veterans had already received paid vacations from the Army. An additional vacation from Sears would have placed them in a better position than their civilian counterparts. In contrast, plaintiff Smith is not entitled to any pension benefits from the military. In this case, granting the plaintiff credit for his years in the military will only place him in a position equivalent to that of civilian employees who did not interrupt their regular employment to serve in the military. This was the intended purpose of the Military Selective Service Act.

B. *Laches*

The second issue the Court must resolve is whether plaintiff's claims are barred by laches. The test of laches is inexcusable delay and consequent detriment or prejudice to the defendant. The existence of laches is a question largely within the discretion of the trial court. *Gardner v. Panama R.R. Co.,* 342 U.S. 29 (1951). The Court finds that Mr. Smith pursued his cause with due diligence. Although defendants' pension plan from its inception in 1956 denied credit for military leave and required 1,730 work hours per year, it was not until the 1970 amendments that Mr. Smith's years of military service were eligible for pension credit, save for the work hour requirement. In December, 1970, plaintiff Smith filed a complaint with the Department of Labor concerning the denial of pension benefits, and the defendants were immediately apprised that his complaint was under investigation. The time from December, 1970, until the filing of the complaint in August, 1973, was spent in investigation, negotiation, and preparation. Since the facts are clear and undisputed, defendants have not been prejudiced by even this amount of delay. The Court finds that plaintiff's claims are not barred by laches.

Accordingly, IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff's motion for summary judgment is granted and defendants' motion for summary judgment is denied.
2. Plaintiff is entitled to the seniority status and pay in his employment which he would have enjoyed had he not served in the Armed Forces of the United States.
3. Defendants shall compute the amount of pension benefits due plaintiff Smith, affording him as past-credited service the amount of time spent in the military service.
4. Defendants shall retroactively compensate plaintiff for the pension benefits that were unlawfully denied to him.
5. Plaintiff shall recover costs.
6. Plaintiff shall submit a judgment in accordance with the foregoing by December 10, 1974.

Dated: November 25, 1974.

WILLIAM H. ORRICK, JR.
William H. Orrick, Jr.
United States District Judge

Appendix D

PENSION AGREEMENT

BETWEEN

INDUSTRIAL EMPLOYERS AND
DISTRIBUTORS ASSOCIATION

AND

WAREHOUSE UNION
LOCALS 6 and 17
I.L.W.U.

*

June 1, 1970 to May 31, 1973

PENSION AGREEMENT

THIS AGREEMENT, made and entered into this 10th day of August, 1970, by and between INDUSTRIAL EMPLOYERS AND DISTRIBUTORS ASSOCIATION, as collective bargaining agent for and on behalf of those present members of the Association now parties to the existing Master Contract, a list of which firms is attached hereto marked Exhibit A (subject, however, to the rights of said Association members as set forth in Article IV of the Association By-Laws) and also on behalf of those firms who hereafter become Association members and adopt this Agreement, as provided in Section 2 hereof; and WAREHOUSE UNION LOCAL 6, ILWU AND WAREHOUSE UNION LOCAL 17, ILWU

WITNESSETH

WHEREAS the Parties entered into a Pension Agreement as of June 1, 1956 and thereafter from time to time amended and extended the same, and now desire to further amend and extend such Pension Agreement as hereinafter set forth;

NOW THEREFORE it is agreed:

Section 1. Definitions.

"Association" means Industrial Employers and Distributors Association.

"Union" means Warehouse Union Local 6, ILWU and Warehouse Union Local 17, ILWU.

"Covered Employer" means an Employer covered by the pension plan as provided in Section 2.

"Covered Employee" means any employee in the Local 6 or Local 17, ILWU collective bargaining unit of a covered employer.

"Collective Bargaining Unit" means a unit of employees for which Local 6 or Local 17, ILWU is recognized as the collective bargaining representative by a covered Employer.

"Collective Bargaining Agreement" means a contract covering wages, hours and other conditions of work between an Employer and Local 6 or Local 17, ILWU as such contract existed at the point of reference or was thereafter renewed, amended or renegotiated.

"Master Contract" means that certain Master Contract on wages, hours and other conditions of work between the Association and the Union dated June 1, 1953 as subsequently extended and renewed as it now exists, or as it may be renewed, amended or renegotiated from time to time during the term of this pension agreement.

"Establishment" means the Local 6 or Local 17, ILWU bargaining unit in one physical location, warehouse or plant of an Employer covered by the pension plan as it may be or may have been located at any time while under contract with Local 6 or Local 17, ILWU or their I.L.A. predecessors.

"Covered Establishment" means an establishment in which past or future service credits are allowed under the plan.

"Covered Employment" means employment in an establishment for which past or future service credits have been or may be earned in accordance with the provisions of Section 7.

"Plan" means the pension plan set forth herein.

"Pension" means the monthly retirement income payable to an employee after his retirement in accordance with the terms of the plan.

"Credited Service", "Future Service", and "Past Service" are defined in Section 7.

"Present Employee" and "Future Employee" are defined in Section 4.

"Company Plan" and "Existing Company Plan" are interchangeable and mean a pension plan previously established by a covered Employer.

"Pension Trust" means that certain trust which was created by the Association pursuant to the trust agreement referred to herein for the purpose of financing and administering the payment of pension benefits as provided in Section 9.

"Trust Agreement" means that certain agreement dated July 18, 1956 which was executed by the Association and the trustees for the purpose of establishing the pension trust.

"Trustees" means the trustees of the pension trust.

Masculine pronouns shall include both male and female genders unless the contract indicates otherwise.

Reference herein to "Local 6 or Local 17, ILWU" shall be taken to include Local 67, ILWU in those instances in which an individual Employer has a collective bargaining agreement with Local 67, ILWU, and such collective bargaining agreement provides for the coverage of employees under this Pension agreement.

Section 2. Employers Covered by the Pension Plan.

Employers covered by the pension plan shall be:

A. Those Employers in whose behalf the Association has executed this pension agreement and who subscribe to the pension trust and make the pension contributions to the pension trust as required by this pension agreement; and

B. Employers who hereafter become parties to the Master Contract pursuant to Section 1.3 thereof, and who adopt this pension agreement and subscribe to the pension trust and make the pension contributions to the pension trust as required by this pension agreement.

C. Employers not members of the Association (but who are parties to a collective bargaining agreement with Local 6 or Local 17, ILWU) who adopt this agreement and the pension plan provided herein, and who with the consent of the Association and the trustees subscribe to the pension trust and make the pension contributions to the pension trust as required by this pension agreement; provided, however, that the Association shall not be considered a party to any such agreement between non-members and the Union nor shall it be considered the representative of such non-members for collective bargaining purposes or for the purpose of enforcing any agreement between the Union and a non-member of the Association; and

D. Locals 6 and 17, ILWU and the International Longshoremen's and Warehousemen's Union under the terms and conditions stated in Section 3 of this pension agreement.

Section 3. Eligible Employees.

All employees in the Local 6 and Local 17, ILWU, bargaining units of the Employers shall be covered by the pension plan and shall be eligible for pension benefits provided they retire with sufficient credited service as provided in the plan; in addition, all such employees shall have an interest in the trust fund determined in accordance with Section 29.

In addition all full-time paid members of the staff of Local 6, ILWU (excluding, however, all office workers) and also such full-time paid international officers of the International Longshoremen's and Warehousemen's Union as may have advanced to such International office from the ranks of Local 6, ILWU and may

be designated by Local 6, ILWU as eligible for such pension benefits, shall be eligible for pension benefits provided that they retire with sufficient credited service as provided in the plan. Pension coverage for such officers and staff of Local 6, ILWU and of the International shall be retroactive to June 1, 1956, provided the Union adopts this pension agreement as an employer and subscribes to the pension trust and makes contributions to the pension trust as required by this pension agreement retroactive to June 1, 1956, and also pays the standard uniform subscribers' fee uniformly required of all subscribers to the plan.

Section 4. Retirement Date.

A. Present Employees.

Automatic Retirement Date. The automatic retirement date for any present employee (i.e., any employee whose credited service at time of retirement commenced prior to June 1, 1956) shall be the earliest of the following dates:

(1) The first of the month following both
  (a) attainment of age 65, and
  (b) completion of 25 years of credited service;

(2) The first of the month following both
  (a) attainment of age 68, and
  (b) completion of 15 years of credited service;

(3) The first of the month following attainment of age 70, regardless of the period of, or lack of, any credited service.

Retirement Prior to Automatic Retirement Date.

A present employee whose automatic reterment date is later than the first of the month following his 65th birthday may retire prior to his automatic retirement date on the first of the month following 30 days' written notice to his Employer and the trustees, provided he has then attained age 65 with 15 years or more of credited service.

B. Future Employees

Automatic Retirement Date. The automatic retirement date of any future employee (i.e., an employee whose credited service at time of retirement commenced on or after June 1, 1956) will be the first of the month following the attainment of age 65 regardless of the period of, or lack of, any credited service.

Retired employees shall be paid pension benefits upon date of retirement based upon their credited service at such time.

C. Automatic Retirement Provisions Apply to all Employees

The automatic retirement provisions of this agreement apply to all employees in the collective bargaining units covered by the collective bargaining agreements between the Employers covered by the pension plan and Local 6 and Local 17, ILWU. The foregoing automatic retirement provisions are not in lieu of any existing compulsory or automatic retirement plans of any Employers covered by the pension plan, and in any case where an Employer covered by the pension plan presently has in effect a compulsory or automatic retirement plan different from that provided in this pension agreement, such existing plan shall be considered paramount and controlling. The Union does not admit by this agreement that any Employer has an existing compulsory retirement plan and reserves its rights under the Master Contract as in effect May 31, 1956 to contest the existence of any company compulsory retirement plan.

Section 5. Optional Early Retirement.

Any employee covered by the plan who attains his 55th birthday or more with 15 or more years of credited service may elect to retire at his option upon 30 days' prior written notice to his Employer and the trustees. In such event his pension shall be the total number of years of credited service at the time of retirement multiplied by the applicable dollar amounts for past and future credited service, but reduced to its actuarial equivalent in relation

to his attained age at the time of actual retirement, and shall be based upon such actuarial assumptions as the trustees of the pension fund may at that time deem appropriate.

Section 6. Pension Benefits.

Pension benefits shall be payable monthly and such monthly benefits shall be the sum of past and future service credits which shall be computed as follows:

A. Future Service.

Six Dollars and Twenty-five Cents ($6.25) for each full year of future service. A full year of future service is defined to be twelve (12) months of credited service in the industry, rendered after May 31, 1956. Service in the industry is defined to be service in an establishment which is covered by the pension plan at the time the service is rendered, and for which his Employer shall have paid to the pension trustees for each month for which such future credited service is claimed the sum of Seventeen Dollars and Thirty Cents ($17.30) prior to June 1, 1966; the sum of Twenty-five Dollars and Ninety-five Cents ($25.95) for the period commencing June 1, 1966 and ending May 31, 1970; the sum of Forty-three Dollars and Twenty-five Cents ($43.25) for the period commencing June 1, 1970 and ending May 31, 1972; and thereafter the sum of Fifty-one Dollars and Ninety Cents ($51.90).

Where an establishment was not covered by this pension plan by December 30, 1956, and thereafter becomes covered as provided in Section 2, the covered employees of such establishment shall be allowed future service credit as follows:

(i) for the period commencing June 1, 1956, and ending on the date the establishment becomes covered, as provided in Section 2, the employee shall be credited with future service for his continuous service in such establishment during such period (and at such rate) as shall be jointly determined by the Association

and the Union at the time such establishment becomes covered under the plan;

(ii) for the period commencing when the establishment becomes covered as provided in Section 2, the employee shall be allowed Six Dollars and Twenty-five Cents ($6.25) for each full year of future service after such date on the terms and conditions stated in the first paragraph of this subparagraph A of Section 6.

B. Past Service.

Past service is defined to mean credited service rendered prior to June 1, 1956. Past service credits shall be allowed as follows:

Six Dollars and Twenty-five Cents ($6.25) per month for each full year of past credited service with an establishment which became covered by this pension plan not later than December 31, 1956, and which was covered by a collective bargaining agreement with Local 6 or Local 17, ILWU as of May 31, 1956.

Six Dollars and Twenty-five Cents ($6.25) per month for each full year of past credited service with an establishment which at the time of such service was under contract with Local 6 or Local 17, ILWU, and in which establishment as of May 31, 1956 neither Local 6 nor Local 17, ILWU, had any recognized collective bargaining unit.

Past service will be credited to an employee only if:

(i) Such employee (unless permanently and totally disabled from performing any work in the industry in which event the requirements of this subsection (i) shall not apply) has worked or hereafter works actively as an employee for an establishment or establishments covered by the plan for a minimum of 1730 hours after May 31, 1956, and his Employer or Employers has paid or pays to the pension trust the full contribution required by this agreement for such 1730 hours of work; and

(ii) The establishment in which the claimed past service was rendered became covered by this pension plan not later than

December 31, 1956; provided, that such pension plan coverage shall not be required if the Employer of such establishment ceased on or before May 31, 1956 to recognize Local 6 or Local 17, ILWU as the collective bargaining representative of any of the employees thereof; and

(iii) His credited service at the time of retirement commenced prior to June 1, 1956.

Where an establishment was not covered by this pension plan by December 31, 1956 and thereafter became or becomes covered as provided in Section 2, the covered employees of such establishment shall be allowed such past service credit as the Association and the Union have determined or as they shall then jointly determine, and the Employer may be required to contribute to the trust for such past service such amount (in addition to all other contributions required herein to be paid by covered Employers) as the Association and the Union shall determine. The Association and the Union may also agree that the pension benefits for such covered employees shall commence one year or later after such Employer enters the plan.

C. Maximum Years of Service for Retirement.

The maximum number of years of future service or past service, or future and past service combined, which shall be credited to any employee shall be thirty-five (35) years; provided, however, that as to any employee who retired prior to June 1, 1970 the maximum number of years of credited service shall be twenty-five (25).

D. Minimum Years of Service for Retirement.

No employee shall be entitled to any pension benefits unless at the time of retirement he shall have a minimum of fifteen (15) years of credited service; provided, that "present employees" who are automatically retired on June 1, 1957 because they have attained age seventy (70) prior to such date, or who are thereafter

automatically retired at age seventy (70), and who then have some credited service (but less than 15 years of credited service) at such automatic retirement date, shall be retired on a pension computed by multiplying the total number of years of credited service at time of retirement by the applicable dollar amounts for past and future credited service; and provided further that deferred pension benefits shall be paid to employees having less than 15 years of credited service as provided in Section 7 D.

E. Time of Commencement and Duration of Pension Benefits.

An employee who is eligible for retirement benefits under the plan shall receive his first monthly pension payment on the first day of the calendar month following his retirement in accordance with the plan and receipt by the pension trustees of his written application for pension benefits. Subsequent monthly payments shall be payable to him on the first day of each calendar month thereafter throughout his remaining lifetime terminating with the last monthly payment before his death.

F. Monthly Pension Benefits.

An employee's monthly pension benefits at the time of retirement shall be the total number of years of credited service at that time, multiplied by the applicable dollar amounts for past and future credited service.

G. Joint and Survivor Option.

In lieu of the pension benefit otherwise payable under this Plan, an employee entitled to a pension benefit on his Automatic Retirement Date or retirement prior to Automatic Retirement Date as provided in Section 4A and B; or on his Optional Early Retirement Date as provided in Section 5, may elect to receive payment equal to the actuarial equivalent of his monthly pension benefit in the form of a lower monthly amount with the provision that 50% or 100% of that lower amount (whichever the employee elects) is continued after his death for the lifetime of his lawful spouse

married to him for at least three years prior to retirement. Such adjustment in benefit amount shall be determined by the trustees on advice of their actuary and shall take into account the sex of the employee and the age when payment of the optional form is to commence and the sex and age of the lawful spouse. Once pension benefits commence under this option, the retired employee shall not be eligible for death benefits provided under Section 7F. This option is available only to employees retiring after May 31, 1970.

The election of this option must be in writing on a form prescribed by the trustees and must be filed with the trustees at least twenty-four (24) months before the employee's retirement; provided, however, that employees retiring prior to December 31, 1970 shall be allowed to elect this option at the time they apply for pension benefits, and employees who will retire on their Automatic Retirement Date (including retirement prior to Automatic Retirement Date as provided in Section 4A) or an Optional Early Retirement (as provided in Section 5) between December 31, 1970 and January 1, 1972, shall be required to elect this option, if they desire to do so, by filing the prescribed form with the trustees on or before December 31, 1970.

Once elected, the Joint and Survivor Option may not be changed or revoked except under the following conditions:

(i) Revocation or change must be made in writing on a form prescribed by the trustees and filed with the trustees at least 24 months prior to the employee's retirement.

(ii) The option shall be automatically revoked if either the employee or his lawful spouse dies before the employee's retirement.

If the lawful spouse dies before the employee's retirement, the employee upon retirement shall receive the full monthly pension benefit. If the lawful spouse dies after the employee's retirement, the employee's payment shall be in the same amount as that payable under the Joint and Survivor Option.

Section 7. Credited Service.

"Credited service" means the amount of continuous service to be counted in computing an employee's pension benefits. "Continuous service" means continuous employment in a covered establishment. Continuous service, whether past or future, shall be considered broken by failure of the employee for a period of twenty-four (24) or more consecutive months to perform paid-for work in any covered establishment; provided, however, that for (1) employees who retired prior to June 1, 1966, whether on pension or not, and (2) employees who left the industry prior to June 1, 1966 (i.e., performed no paid-for work in any covered establishment between June 1, 1965 and May 31, 1966), failure to perform paid-for work in any covered establishment for a period of twelve (12) or more consecutive months shall constitute a break in service whether such service be past or future or both.

Service which shall be recognized or credited is only that which was or shall be rendered during the longer of the following:

(i) The period comprising the thirty-five (35) years next preceding the employee's automatic retirement date (for employees who retired on or before May 31, 1970, the period comprising the twenty-five (25) years next preceding the employee's automatic retirement date).

(ii) The period commencing with the employee's thirtieth (30th) birthday (for employees who retired on or before May 31, 1970, the period commencing with the employee's fortieth (40th) birthday).

Any employee who commenced or hereafter commences his continuous service after May 31, 1956, and who is older than fifty (50) years on the date he commences such continuous service shall be ineligible for any credited service or retirement benefits.

Employees shall be credited with their past and future continuous service in accordance with the following conditions:

A. Credited Past Service.

Subject to the conditions stated in Section 6, subsection B, one (1) full year of past service credit shall be credited to an employee for each full year of covered employment rendered during the longer of the following and prior to June 1, 1956:

(i) The period comprising the thirty-five (35) years next preceding the employee's automatic retirement date (for employees who retired on or before May 31, 1970, the period comprising the twenty-five (25) years next preceding the employee's automatic retirement date).

(ii) The period commencing with the employee's thirtieth (30th) birthday (for employees who retired on or before May 31, 1970, the period commencing with the employee's fortieth (40th) birthday).

A full year of covered employment for past service shall mean any year prior to June 1, 1956, for which a covered employee received full vacation benefits (pursuant to the applicable collective bargaining agreement between his Employer and Local 6 or Local 17, ILWU) for work performed in a covered establishment; provided, that the hours worked by a covered employee in a covered establishment during any year prior to June 1, 1956, for which he failed to receive such full vacation benefits may be added to the hours worked by such employee in any other such year in which he also failed to receive such full vacation benefits, and a full year of past service credit will be allowed for each 1730 such hours; provided, further, however, that no more than 1730 hours worked in any one year may be counted for this purpose. Continuous service rendered in a covered establishment prior to its organization by Local 6 or Local 17, ILWU or their I.L.A. predecessors shall be counted for this purpose.

The past service credit of each employee as of May 31, 1956, has been jointly determined by the Association and the Union and a written record of such determination has been made.

B. Credited Future Service.

Future service shall be credited only for services rendered by "regular employees" and shall not be credited for service rendered by casual employees or by any employee other than a regular employee.

Any covered employee employed thirty (30) continuous calendar days by a covered Employer by the 20th day of any month shall be considered a "regular employee" and his status as a regular employee shall continue until the first day of the calendar month following his termination or layoff by such Employer. (Amendment No. 1, dated June 30, 1961, to this pension agreement separately defines the term "regular employee" for what is commonly known as the "weighers and strappers industry" which is limited to seven (7) specific Employers.) A copy of Amendment No. 1 is attached hereto marked Exhibit "B".

Each regular employee shall be credited with one full month of future service, provided:

(i) His Employer shall contribute to the pension fund the required monthly contribution of Seventeen Dollars and Thirty Cents ($17.30) for each month of service prior to June 1, 1966; Twenty-five Dollars and Ninety-five Cents ($25.95) for each month of service during the period commencing June 1, 1966 and ending May 31, 1970; Forty-three Dollars and Twenty-five Cents ($43.25) for the period commencing June 1, 1970 and ending May 31, 1972; and Fifty-one Dollars and Ninety Cents ($51.90) for each month of service thereafter.

(ii) Such employee during the preceding calendar month either (a) performed some paid-for work for such Employer, or (b) received sick leave pay in accordance with Section 14 of the Master Contract, or (c) received holiday pay as provided in the Master Contract, or (d) was on vacation and received vacation pay in accordance with the provisions of the Master Contract.

Sick leave, holiday, or vacation pay in excess of that provided in the Master Contract will not be counted for the purpose stated in this subsection B even though the Employer may grant such excess benefits voluntarily or by reason of a collective bargaining agreement different from the Master Contract, or by reason of addenda to the Master Contract.

C. Break in Service.

Failure of an employee to perform paid-for work in any covered establishment for a period of twenty-four (24) or more consecutive months shall constitute a break in continuous service whether such service be past or future or both; provided, however, that for (1) employees who retired prior to June 1, 1966, whether on pension or not, and (2) employees who left the industry prior to June 1, 1966 (i.e., performed no paid-for work in any covered establishment between June 1, 1965 and May 31, 1966), failure to perform paid-for work in any covered establishment for a period of twelve (12) or more consecutive months shall constitute a break in service whether such service be past or future or both.

Except as provided in subsection D of this Section 7, all credited service, whether past or future, rendered prior to a break in service shall be forfeited by such break and if an employee whose continuous service was broken in the past or should be broken in the future was or shall be later re-employed, he shall be considered a new employee for the purpose of the plan and no credit shall be given for any service performed prior to such re-employment.

Absence from employment while on active duty in any military service of the United States, for which re-employment rights are accorded by act of Congress, involuntary absence from employment prior to June 1, 1956, due to geographical relocation pursuant to the order of any military service of the United States, and absence from employment due to industrial injury while in the employ of an Employer covered by the plan, or while continuously employed (during World War II) in the U. S. Marine Corps

Warehouse in San Francisco pursuant to dispatch by Warehouse Union Local 6, on direction of the U.S. Manpower Commission, shall not constitute unemployment or a break in continuous service, but no credit shall be allowed for such service. A list of employees affected by the clause pertaining to employment in the U. S. Marine Corps Warehouse has been agreed upon in a separate instrument which has been executed by the parties hereto. Leaves of absence for Union officials in accordance with the applicable collective bargaining agreement shall not constitute a break in service, but no credit shall be given therefor. If a present employee as defined in Section 4 A is absent from employment after attaining age 65 with less than 15 years of credited service, due to permanent and total disability commencing after May 31, 1956, such absence shall not constitute a break in service, but no credit shall be given therefor.

Absence from employment in any covered establishment while employed in a collective bargaining unit covered by agreement between Warehouse Union Locals 6 or 17, ILWU, and an Employer who, on June 1, 1956, and during the term of such employment, maintained a pension plan which Local 6 or Local 17, ILWU, has accepted in lieu of the plan, shall not constitute unemployment or a break in continuous service, but no credit shall be allowed for such service. A list of non-covered Employers, service with whom will not constitute such unemployment or a break in continuous service, has been agreed upon in a separate instrument which has been executed by the parties hereto.

D. Deferred Vested Pension.

Any covered employee who suffers a break in service after May 31, 1966, and who at the time of such break has been in covered employment for fifteen (15) or more years of continuous service shall at the time of such break, if he has then attained age 40, be vested with the right to receive at age 65 a pension benefit to be computed by multiplying the number of years of credited service

which were served by such employee after age 30 (age 40 for employees who suffered a break in service after May 31, 1966 but prior to May 31, 1970) and during such period of continuous service by the amount of Six Dollars and Twenty-five Cents ($6.25). The deferred pension benefit provided herein shall be paid in the manner and for the period prescribed in Section 6E.

If any employee who has become eligible for a deferred pension benefit thereafter returns to covered employment, the deferred benefit for which he has become eligible will not be adversely affected, but for all other purposes under the plan he shall be considered a new and different employee.

Applications for payment of deferred benefits to which employees may have become entitled pursuant to this Section 7 D must be submitted not earlier than six (6) months prior to the employee's 65th birthday. Any employee who is eligible for a vested deferred benefit hereunder and who files his application therefor after attaining age 65 shall receive his first monthly deferred pension benefit as provided herein commencing with the first calendar month after receipt by the pension trustees of such application; and in such event payments will not be retroactive to the month first following the employee's attainment of age 65.

E. Total and Permanent Disability Option.

Any employee who after June 1, 1970 becomes totally and permanently disabled at a time when he has accrued fifteen (15) or more years of credited service may elect to retire and receive commencing with the first of the month next following date of such retirement a monthly pension based on his accrued pension benefits at the date of his retirement. Notice of such election shall be in writing on a form prescribed by the pension trustees. No application for such disability retirement shall be considered by the pension trustees unless at the time such application is filed the employee has been determined to be totally and permanently disabled by the Federal Social Security Administration and has been awarded an appropriate Social Security benefit based upon such determination. The pension trustees may in their discretion require medical examination by a physician or physicians of their choice; and may terminate such disability pension if the employee ceases to be permanently and totally disabled after his disability pension commences. The recipient of or applicant for a disability pension shall cooperate with the pension trustees in making an initial or any subsequent review of a claim of permanent and total disability.

Disability pension benefits shall not be subject to actuarial reduction because of retirement prior to normal retirement age.

F. Pre-retirement Death Benefit.

Any employee who dies before retirement but after having attained age 60 with fifteen (15) or more years of credited service shall be entitled to a pre-retirement death benefit equal to one-half of his accrued pension benefits at date of death. Such death benefit shall be limited exclusively for the lawful spouse of such employee to whom he or she has been lawfully married for three or more years prior to date of death. Payment of such death benefit shall commence on the first day of the month following date of death and shall cease on the death of such beneficiary spouse. The trustees of the pension trust may require the completion of appropriate forms and notices to enable them to carry out and perform the requirements of this pre-retirement death benefit provision.

Section 8. Employment of Retired Persons.

No employee shall be employed in a covered establishment after his retirement; and no employment of a retired employee by any covered Employer in violation of the foregoing provision shall entitle any such retired employee to any subsequent pension rights or benefits. The Association shall, upon discovery of any such violation, direct the trustees to suspend payment of pension benefits for such retired employee for a period of time equal to the duration of such prohibited employment. For the purposes of this

Section 8 the term "retired employee" shall be deemed to include persons who have attained age 65 and are receiving deferred pension benefits, as well as persons who have retired at Automatic Retirement Date, Optional Early Retirement Date, or on disability pension.

Section 9. Financing of Pension Benefits.

A. Plan to be Non-Contributory.

No employee shall be required to make any contribution to the pension fund. The entire cost of contributions to the pension trust shall be borne by the Employers party to the plan.

B. Creation of Pension Trust.

The Association shall immediately cause the creation of a pension trust for the purpose of financing and administering the payment of the pension benefits provided in the pension plan. The trustees shall be appointed and may be removed exclusively by the Association. The Association shall have full control of the pension trust and the pension fund without any participation therein by the Union.

C. Liability of Association, Employers and Trustees.

Liability for payment of the pensions under the pension plan shall be exclusively upon the pension trust and the pension fund, and there shall be no liability therefor upon any Employer or upon the Association. The liability of the Employers, parties to the pension plan, shall be limited to the payment into the pension trust of the contributions required by this agreement, and any Employer having made the agreed contributions shall have fully discharged his liability and responsibility under this pension agreement and the pension plan. Neither the Union, the Association nor any of the Employers shall be liable for the failure of the trustees to secure the benefits contemplated by this agreement for any employee or pensioner, or for any default or neglect of the trustees.

The trustees while acting in good faith shall incur no individual or collective responsibility, liability, or obligation for any action taken or for any acts omitted to be taken by them, except as otherwise expressly assumed in the trust agreement.

D. Directions to Trustees for Payment of Pensions.

The trustees shall pay, or cause to be paid, to retired employees the pensions to which they are entitled under the plan as determined and directed by the Association, and the Association shall give written notice to the Union of all such determinations and directions. If the Union should dispute any determination or direction of the Association of the amount of pension to which a pensioner is entitled under the plan, then and in that event such dispute shall be subject to determination by the grievance procedure of this agreement as set forth in Section 14. The trustees shall be fully absolved and free from all liability in making payment of pensions in accordance with such determination and direction of the Association, but if the Union should by written notice to the trustees dispute any such determination and direction of the Association, the trustees shall not thereafter make any payment of pension to the pensioner or pensioners affected by such dispute until the dispute has been resolved in accordance with such grievance procedure, following which the trustees shall make payment of such pension, if any, to the affected pensioner or pensioners in accordance with the final determination of such grievance. Pending final determination of any such grievance the trustees shall nevertheless make payment from the trust fund to the affected pensioner or pensioners of such amount or amounts on account of the pension or pensions claimed to be due, as may be agreed upon in a written instrument executed for that purpose by the Association and the Union and delivered to the trustees.

E. Contributions to the Pension Trust.

Each Employer, party to the pension plan, shall during the term of this pension agreement pay contributions to the trustees of the pension fund as follows:

(i) Regular Employees

The sum of $17.30 prior to June 1, 1966; the sum of $25.95 for the period commencing June 1, 1966 and ending May 31, 1970; the sum of $43.25 for the period commencing June 1, 1970 and ending May 31, 1972; and thereafter the sum of $51.90 for each month for which a "regular" employee qualifies for a month of future credited service as provided in Section 7, subsection B.

(ii) Other Employees

Ten Cents (10¢) prior to June 1, 1966; Fifteen Cents (15¢) for the period commencing June 1, 1966 and ending May 31, 1970; the sum of Twenty-five Cents (25¢) for the period commencing June 1, 1970 and ending May 31, 1972; and thereafter Thirty Cents (30¢) for each straight time hour worked by all other employees.

The foregoing contributions shall be made with respect to all employees of the Local 6 and Local 17, ILWU, collective bargaining units of the Employers' covered establishments irrespective of the age of any such employee.

F. Purposes for which Pension Trustees may use Pension Contributions.

The foregoing pension contributions and income therefrom shall be used by the pension trustees to pay all expenses of the trust, including all expenses of administration, and to pay employees retired under the pension plan the pension benefits for which such employees shall become eligible in accordance with the provisions of the pension plan.

G. Effect of Strike or Work Stoppage on Pension Contributions or Credits.

No Employer shall be required to make any contribution to the pension trust with respect to any employee for any month during any part of which such employee shall be on strike, shall participate in a concerted refusal to work for such Employer, or shall absent himself from work by observance of a picket line (excepting, however, any observance for a part of a calendar month only of a picket line which does not constitute a violation of the Master Agreement between the parties as provided in Section 3 thereof) or by other work stoppage or refusal to work for such Employer; and such employee shall not be allowed any credited service for any such month.

Section 10. Contributions Not Recoverable.

Under no circumstance shall any contribution made by any Employer to the pension trust in accordance with the requirements of this pension agreement be recoverable by the Employers, or any of them, or be used for or diverted for purposes other than for the exclusive benefit of the employees entitled to pensions under the plan as provided in the preceding subsection F; provided, however, that in the event that any Employer shall make any payment to the trust fund in excess of the amount required by this pension agreement, then such excess payments by such Employer may be applied in satisfaction of any succeeding payment due from such Employer.

Section 11. Existing Plans.

The Union recognizes that some Employers, party to this pension agreement, have existing pension plans. No Employer having an existing pension plan shall be required to maintain such existing plan in whole or in part and each Employer reserves full right to amend any existing plan so as to exclude from benefits thereof employees in a collective bargaining unit covered by the pension plan. The Union consents in its own behalf and in behalf of its

members to the termination of any existing company plan and to the amendment of any existing company plan so as to exclude therefrom the employees in a collective bargaining unit covered by this pension agreement; and the Union also agrees upon request to execute such additional documents as may be required to effectuate such consent.

Where an Employer continues its company plan for a covered establishment, it may reduce the benefits attributable to the company's contributions to such company plan in such amount as the company in its exclusive judgment shall determine.

Pension benefits in company plans which are provided by the Employer's contributions to such plans shall be included in satisfying the benefits to which employees under the pension plan may be entitled. Where a company plan provides from the Employer's contributions all or any portion of the pension benefits to which the employee is entitled under the pension plan, then and in such event, the pension benefits payable by the pension trust shall be reduced in an amount equivalent to the pension benefits provided by the Employer's contributions to its company plan.

Where the employee contributes to the cost of the company plan it shall be assumed that the cost of the joint contributions of the company and the employee toward pension benefits shall be allocated as follows: Each $100 of the employee's contributions shall be assumed to have purchased a benefit of $1.00 per month and the balance of the benefits shall be assumed to have been purchased by the company.

Where a company plan contributed to the total pension benefit received by an employee receiving pensions from the pension trust provided herein, the pension trustees may determine the value of the company's contribution to the total pension benefit and may allow such company a credit on future liability for contributions based upon such valuation. Such valuation shall be determined

exclusively by the trustees and the Union shall be advised of such valuation.

In determining whether an employee is receiving or is entitled to receive pension benefits from Employer contributions to a company plan, it will be assumed that the employee is receiving such benefits from the company plan even though he may have previously, then, or thereafter liquidated or taken the cash value of the pension benefits provided for him by the company's contributions. In fixing the credit and value of the pension benefits to an employee under a company plan, such credit and value will be based upon the amount of benefit which the company plan would provide such employee at actual date of retirement for the remaining life of the employee even though the employee may have elected under options available to him by the company plan to have accepted a lesser or greater amount.

The trustees shall be under no obligation to allow any credit to any Employer for contributions to an existing company plan until the actual date of retirement of the affected employee; provided, however, the trustees may in their exclusive discretion when satisfied that an existing company plan will relieve the trust of a substantial liability for pensions grant a credit in advance of actual retirement and apply such credit to the contribution liability of the company affected.

Section 12. Waiver of Industry Pension Rights by Employees.

Several Employers who are parties to collective bargaining agreements with the Union have expressed the desire to permit their present employees to elect whether they would accept the existing company pension plan exclusively or would prefer to participate in the industry pension plan provided by this pension agreement. The Association and the Union are studying such requests and there is no commitment by the Association or the Union to allow or disallow such requests. In the event that any

employee, with the consent of the Union, the Association, and his Employer, has elected or hereafter elects to accept the benefits of the existing company pension plan of his Employer exclusively and to waive the benefits of the industry pension plan provided by this agreement, then and in such event such employee shall execute a written waiver in such form as shall be agreed upon by the Association and the Union and by execution of such waiver the employee will waive all credited service and all pension rights provided by this pension agreement. An Employer, party to this agreement, whose employee shall have executed such a waiver with the written consent of the Employer, the Association, and the Union, shall not be required to make any contributions to the pension trust with respect to any work performed by the employee who has executed such waiver. If such employee should thereafter terminate his service with his Employer and be later employed by another Employer party to this pension agreement, then and in such event the employee shall be considered a new employee for the purpose of earning credited service and pension rights under this pension agreement.

Section 13. Employee Options under Existing Contributory Company Plans.

In company plans where the employees make contributions, the options of the employees covered by such plans shall be those provided in the company plans. No Employer, however, shall in any event be required to continue any company plan in whole or in part.

Section 14. Administration of the Plan.

The pension trust and the pension fund shall be administered exclusively by the trustees appointed by the Association. The Union and the Association shall jointly determine and resolve grievances which may arise concerning the administration of the pension plan itself (but not the pension trust or pension fund) including questions of eligibility, credits for continuous service,

questions concerning employee's contributions to existing company plans, and other such matters of mutual interest to the Union and the Association. Any unresolved differences on such matters shall be settled pursuant to the grievance procedure set forth in Sections 19.1, 19.2 and 19.3 of the Master Contract. The Association shall not be required to represent any Employer which is not a member of the Association in any such grievance, provided that the Association may at its option intervene at any stage of such grievance procedure to prevent a construction of this agreement adverse to its interest or that of its members or to prevent a determination of the grievance prejudicial to the interests of Association members in the pension fund.

Section 15. Non-Vesting.

No employee shall have any vested right in the pension trust, pension fund, or any portion thereof, income therefrom or contributions thereto. Employees shall have only those rights expressly conferred herein.

Section 16. Non-Assignability.

Neither the Association nor any Employer, party to this pension agreement, or any fund which may be set apart for the payment of benefits including the pension fund provided herein, shall in any manner be liable for or subject to the debts or liabilities of any employee, retired employee or pensioner. No employee or pensioner shall have any power to assign, transfer, encumber, borrow on the security of any pension payable under the plan, or to anticipate any payment to which he may be entitled under the plan or any interest in any fund established pursuant to the plan, and any attempt so to assign, transfer, pledge, encumber, commute or anticipate shall be void; nor shall any right, benefit, pension, payment of pension benefits, or of any interest in any pension fund or payments therefrom be in any manner subject to alienation, sale, transfer, levy, attachment, assignment, pledge,

encumbrance, or legal process to enforce payment of any kind, against an Employer or pensioner.

Section 17. Annual Actuarial Review.

There shall be an annual review of the actuarial soundness of the pension fund as of June 1st of each year during the term of the agreement. Such review shall be made by the trustees of the fund by and with the advice of a qualified actuary selected by the trustees. If on any such review date the trustees shall on the basis of such actuarial advice determine that the pension fund then existing and the pension contributions anticipated to be received by them for the balance of the agreement are insufficient to pay the pension benefits for the lifetime of the pensioners previously retired, and expected to be retired during the balance of the agreement, then, and in such event, the parties shall meet and negotiate to provide for either the deferring of further retirements or the reduction of pension benefits, or both.

In determining the actuarial soundness of the pension fund on any such review the trustees and the selected actuary shall use the following actuarial assumptions:

a. Actual experience under the pension plan for the period from June 1, 1956, through May 31, 1964, shall be the mortality and turnover assumption prior to retirement.

b. After retirement mortality assumptions shall be based upon the 1951 Group Annuity Table set back one year.

c. The assumed pension fund investment yield shall be 4%.

d. The assumed administration cost shall be 3½% (excluding, however, the Corporate Trustee's fees for management and investment of trust funds, which shall be charged against income).

e. Investments shall be evaluated at cost.

f. The unit credit cost method shall be used in making calculations.

g. All unfunded liabilities as of June 1, 1966, shall be amortized over a period of 30 years.

h. Actuarial calculations shall assume a compulsory retirement age of 65.

Section 18. No Strike or Lockout.

The Union agrees not to engage in any strikes or stoppages of work during the term of this agreement and the Employer agrees not to engage in any lockout during the term of this agreement with respect to the subject of pensions or any matter covered by this agreement.

Section 19. Approval of Tax Authorities.

It is the intention of this agreement that contributions shall constitute deductible business expenses by the Employer for income tax purposes and that the trust fund and any interest or increment accruing thereto from investment or otherwise shall not be subject to tax under the provisions of the Internal Revenue Code of 1954. The plan and the trust shall be submitted to the Internal Revenue Service for qualification.

The parties agree to make amendments to the agreement and the Association may authorize and direct the trustees to make amendments to the Declaration of Trust to obtain such qualification initially, and in the same manner attempt to obtain qualification as may be needed from time to time during the life of this agreement and the pension trust; provided, however, that no amendment shall be made to obtain qualification which would alter the intent of the parties as incorporated in this agreement and the trust. Should it become impossible to amend this agreement and the trust to meet the requirements of Section 401 of the Internal Revenue Code of 1954 for qualifying the plan and the trust, or for allowing the Employers' contributions as income tax deductions under Section 404 of the Internal Revenue Code of 1954, this agreement and the trust shall be amended so that the Employers shall be obliged to make no further contributions, and pensions shall in such event be subject to renegotiation.

Section 20. Employer not Liable for Contributions of any other Employer.

Neither the Association nor any individual Employer shall be liable to the Union or the trustees or to any one else for contributions due from any other individual Employer.

Section 21. Proof of Right to Receive Pensions.

Upon application for a pension under the plan the trustees in their discretion may require the employee to establish his age by evidence satisfactory to the trustees.

In addition the trustees shall have the right to require all information which they reasonably deem necessary, including records of employment, proof of dates of birth and death, and evidence of existence; and no benefit dependent in any way upon such information shall be payable unless and until the information so required shall be furnished. Such evidence shall be furnished by the Unions, Employers, employees, retired employees, and former employees, as applicable.

Section 22. No Enlargement of Employee Rights.

Nothing in this agreement shall give any employee the right to be retained in the employment of any Employer party hereto, and all employees shall remain subject to discharge, discipline, layoff, or other change in employment relationship, in accordance with the applicable collective bargaining agreement to the same extent as if this agreement had not been executed or put into effect.

Section 23. Scope of Agreement.

Except as otherwise specifically provided herein, this agreement fully and completely incorporates the understanding of the parties hereto and constitutes the sole and entire agreement between the parties on any and all matters relative to pensions. Neither party shall during the term of this agreement demand any change herein, nor shall either party be required to bargain with respect to any matter relative to pensions, except as otherwise expressly provided in this agreement. Without limiting the generality of

the above, both parties in their own behalf and on behalf of the respective members bound hereby, waive any right to demand of the other any negotiating, bargaining or change during the life of this agreement with respect to pensions or retirement; provided, that nothing herein shall prohibit the parties from changing the terms of this agreement by their mutual consent.

The terms and conditions of this pension agreement shall be separate, independent and exclusive of any collective bargaining agreement(s) on wages, hours and working conditions between the Association, the Employers, and the Union.

Section 24. Approval of Stockholders of Certain Corporate Employers.

Certain of the Employers parties hereto are corporations. Any such corporate Employer desiring to obtain the approval of its stockholders for participation in the pension plan may withdraw from this agreement not later than December 31, 1956, if such stockholder approval is not obtained by such date of withdrawal; provided, however, that any such Employer shall be required to make full payment to the pension trust of all pension contributions required by this agreement until the first day of the calendar month next following such date of withdrawal; and provided, further, that in the event of any such withdrawal by any such corporate Employer, the subject of pensions shall be fully open for negotiation between the Union and such Employer and the Union shall have the right to strike such Employer and such Employer shall have the right to lockout with respect to the subject of pensions notwithstanding the provisions of Section 18 hereof or any other "no strike or lockout" undertaking in the applicable collective bargaining agreement.

Section 25. California Law to Govern.

This agreement and the rights and obligations of the parties hereunder shall be construed in accordance with the laws of the State of California.

Section 26. Small Amounts.

The trustee may make arrangements for the payment of small monthly retirement benefits in less frequent payments of larger amount.

Section 27. Delayed Claims.

No retirement benefit under the plan shall be payable to any employee until after actual retirement and until proper application for such retirement benefit has been made as required by this agreement. In no event shall any employee who delays application or claim for retirement benefits be entitled to retirement benefit payments which might otherwise have become payable before the date of such application or claim.

Section 28. Inability of Retired Employee to Handle his own Affairs.

In the event that the trustees determine that a retired employee to whom a pension is payable is unable to care for his affairs because of illness or accident or mental incompetence, or if any such employee be unable to give a valid receipt for any benefit payment due him under the plan, any payment due (unless prior claim therefor shall have been made by a duly qualified guardian or other legal representative) may be paid by the trustees to the legally appointed guardian or other legal representative of such retired employee, or to his spouse, parent, brother, sister, or other person or institution then in the judgment of the trustees providing for the care and maintenance of such retired employee. Any such payment shall be a payment for the account of the pensioned employee and shall be a complete discharge of any liability of the Association, the Union, the Employers and the trustees under the plan.

Section 29. Termination of Contributions.

The contributions required by this agreement shall cease May 31, 1973 (or if this agreement is continued pursuant to the provisions of Section 31, then on the 31st day of May of the subsequent year when the agreement terminates), regardless of the status of the fund at that time and regardless of whether at that time the pension fund be actuarially sound and sufficient to continue payment of the pension benefits in whole or in part. The plan shall continue in effect thereafter until the then existing fund has been exhausted, and in exhausting the then existing fund the trustees shall apply the trust fund in the following order:

(a) First, an amount, to the extent funds are available, which is actuarially sufficient based upon the actuarial assumptions set forth in Section 17, to continue pensions previously granted and not otherwise provided for;

(b) Next, an amount, to the extent funds are available, which is actuarially sufficient based upon the actuarial assumptions set forth in Section 17, to provide pensions for actively employed covered employees from their automatic retirement date in amounts determined by reference to the total service (but not to exceed thirty-five (35) years) which each such employee has rendered in one or more covered establishments to the date of termination of contributions;

(c) The trust fund as thus allocated shall be distributed to pensioners or applied to continue pensions to pensioners or to provide deferred pensions to actively employed covered employees, to commence on their respective automatic retirement dates, or in such other manner as the Association and the Union may then decide;

(d) Any remaining balance in the trust fund shall be allocated among all actively employed covered employees and pensioners in accordance with some non-discriminatory formula to be determined jointly by the Association and the Union.

Section 30. Amendment of the Plan.

The Association and the Union may at any time or times modify, alter or amend the plan in any respect, retroactively or otherwise. However, no such modification, alteration or amendment shall adversely affect any retirement benefit being paid to

any pensioner except as provided in Section 17 (Annual Actuarial Review) or as provided in Section 29 (Termination of Contributions), or as may be required to obtain or retain approval of the Internal Revenue Service. Any amendment to the plan agreed upon during the term hereof by the Association and the Union shall be binding upon all Employers who are then parties to the plan and who, within 90 days of written notice of such amendment, fail to resign from the plan by giving written notice of such resignation to the Union, the Association and the trustees. In the event of such resignation the subject of pensions shall be fully open for negotiation between the Union and the Employer who resigns and the Union shall have the right to strike such Employer and such Employer shall have the right to lockout with respect to the subject of pensions notwithstanding the provisions of Section 18 hereof or any other "no strike or lockout" undertaking in the applicable collective bargaining agreement.

Section 31. Term of Agreement.

The term of this agreement shall be three years commencing June 1, 1970, and ending May 31, 1973, and it shall not be reopenable prior to its expiration for any purpose (including pension contributions and costs) except that there shall be an annual review of the actuarial soundness of the fund on June 1st of each year as provided in Section 17; provided, further, that this agreement shall continue after May 31, 1973, from year to year unless terminated by either party by sixty (60) days' written notice prior to May 31, 1973, or May 31 of any subsequent year.

IN WITNESS WHEREOF, the parties hereto do hereby execute this pension agreement this 10th day of August, 1970.

WAREHOUSE UNION LOCAL 6, I.L.W.U.
/s/ Curtis McClain

WAREHOUSE UNION LOCAL 17, I.L.W.U.
/s/ Frank Thompson

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION
/s/ Louis Goldblatt

INDUSTRIAL EMPLOYERS AND DISTRIBUTORS ASSOCIATION
/s/ J. Hart Clinton
/s/ R. A. Smardon

Supreme Court, U. S.
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No. 76-1221

In the Supreme Court of the United States

OCTOBER TERM, 1976

INDUSTRIAL EMPLOYERS AND DISTRIBUTORS ASSOCIATION, ET AL., PETITIONERS

v.

EARL J. SMITH

ON PETITION FOR A WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1221

INDUSTRIAL EMPLOYERS AND DISTRIBUTORS ASSOCIATION, ET AL., PETITIONERS

v.

EARL J. SMITH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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1. Respondent Earl J. Smith, a World War II veteran, brought this suit under Section 9 of the Military Selective Service Act of 1967, 62 Stat. 604, 614, as amended, 50 U.S.C. App. 459, to obtain credit for his time in the military service in the computation of benefits under petitioners' pension plan.[1]

After working continuously for more than 12 years for Pabco, the predecessor company to petitioner Bird & Son, respondent was drafted into the armed services in 1942. He applied for reinstatement in October 1945, following an

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[1]The Department of Justice represented respondent pursuant to 50 U.S.C. App. 459(d) (now 38 U.S.C. (Supp. V) 2022).

honorable discharge, was actually returned to work several months later following a strike, and worked continuously until his retirement in November 1970. In 1956, petitioner Industrial Employers and Distributors Association (IEDA), an employers' association, adopted a pension plan on behalf of Pabco and IEDA's other members. The plan allotted a year of past credited service for each year prior to 1956 in which employees worked 1,500 to 1,730 hours,[2] and provided that one-twelfth of a future service credit would be accorded for every month in which the employee was employed on the twentieth day of the month and had been continuously employed for the thirty preceding days. Neither future nor past service credits are awarded under the plan during periods of military service. Thus when the petitioners computed Mr. Smith's past service credits upon his retirement, they refused to count the 34 months he had spent in the armed forces, thereby reducing his monthly pension benefit by $17.71 for the period from January 1, 1971 through December 31, 1973, and $23.39 from January 1, 1974 to the present (Pet. App. 2-4, 13-15).[3]

This suit was filed on August 29, 1973 against Bird & Son, as Pabco's successor, and against IEDA as trustee of the pension fund. The complaint alleged that petitioners were required by the Act to credit Mr. Smith with his 34 months of military service in calculating the amount of his retirement benefits. The district court held that pension benefits, like the severance benefits at issue in *Accardi* v.

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[2]At the time of enactment, the plan excluded from past service all work performed prior to an employee's fortieth birthday. The plan was amended in 1970 to give each employee credit for work performed after his thirtieth birthday.

[3]The amount of the monthly benefit is derived by multiplying the employee's total years of credited service by a fixed dollar amount. Plan Section 6 (Pet. App. 28-32).

Pennsylvania R.R. Co., 383 U.S. 225, were by their "real nature" perquisites of seniority toward which Mr. Smith was entitled to count his time in the military service as time on the job. 385 F. Supp. 1281 (N.D. Cal.)(Pet. App. 12-21). The court of appeals affirmed on different grounds. It held that past service credits, although awarded under the plan on the basis of a substantial work requirement, were essentially a product of "length of service" and thus seniority perquisites protected by the statute. The court held that future credits were equivalent to deferred wages for actual employment similar to the vacation pay at issue in *Foster* v. *Dravo Corp.*, 420 U.S. 92, and were therefore not protected by the Act, regardless of the general nature of pension benefits. 546 F. 2d 314 (Pet. App. 1-11).

2. As petitioners have recognized (Pet. 6), the issue presented in this petition is identical to the issue presented in *Alabama Power Co.* v. *Davis*, No. 76-451, certiorari granted January 10, 1977, argued April 25-26, 1977, namely, whether the seniority provisions of the Military Selective Service Act, as amended, 50 U.S.C. App. 459,[4] require a private employer to credit a returning veteran with his time in the military service when computing the veteran's pension benefits.

Petitioners fear, however, that "the question may drop out of the *Alabama Power* case" (Pet. 6). Their apprehension is unwarranted. As we noted in our brief in that case (a copy of which we are sending to petitioners), there is no substantive difference between eligibility requirements expressed in hours and those expressed in terms of a year's

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[4]The veterans' reemployment provisions at issue here have recently been re-codified without significant change in 38 U.S.C. (Supp. V) 2021 *et seq.*, by the Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. 93-508, 88 Stat. 1578, 1594.

service, where, as here, the hour requirement is equivalent to a year's work and the employee does not gain additional credit for hours worked in excess of the requirement. Brief for Respondent in *Alabama Power Co.* v. *Davis*, pp. 14-15; see *Palmarozzo* v. *Coca-Cola Bottling Co.*, 490 F. 2d 586 (C.A. 2). See also Brief for Respondent in *Alabama Power Co.* v. *Davis*, p. 22, n. 33, for a discussion of the court of appeals' decision in this case.

We therefore believe the two cases are indistinguishable and that the Court's decision in *Alabama Power* will control the present case.

Accordingly, we suggest that action on the petition in the instant case be deferred pending a final decision in *Alabama Power*.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.

Supreme Court, U. S.
FILED
MAY 16 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1221

INDUSTRIAL EMPLOYERS AND DISTRIBUTORS ASSOCIATION, AND BIRD & SON, INC. OF MASS.,

Petitioners,

vs.

EARL J. SMITH,

Respondent.

Petitioners' Reply Memorandum

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Petitioners' Reply Memorandum

This brief is addressed to the "Memorandum for the Respondent" submitted by the Solicitor General.

Respondent's "belief" that this action is indistinguishable from a case presently before this Court, *Alabama Power Co. v. Davis*, No. 76-451,[1] is based upon a misapprehension of the proper inquiry to be made in determining whether a given benefit is a perquisite of seniority to which a returning veteran is entitled to by virtue of The Selective Service Act of 1948, 62 Stat. 614 (50 U.S.C. App. § 459).

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1. Certiorari granted January 10, 1977, argued April 25-26, 1977.

This Court in *Foster v. Dravo Corp.*, 420 U.S. 92, 99-100 (1975) held that the *particular agreement* which creates the benefit in question must be examined to determine whether the benefit is measured by time on the payroll or is a bona fide effort to compensate for work actually performed. If under the particular agreement the benefit is measured by time on the payroll, it is a perquisite of seniority and protected by the statute. If the benefit is a bona fide effort to compensate for work actually performed, it is not so protected.

Respondents' assertion here and in *Alabama Power Co., supra* (brief for respondent in *Alabama Power,* pp. 10-22), that the determination of whether pension benefits are perquisites of seniority is somehow resolved by the philosophical inquiry into the "real nature" of pension benefits was not only disapproved by this Court in *Foster v. Dravo Corp., supra,* but by every court which has addressed the question except the court below here.

The proper inquiry is whether the pension benefit in the *particular agreement* under scrutiny is based upon a *substantial work requirement.* In *Litwicki v. Pittsburgh Plate Glass Ind., Inc.,* 505 F.2d 189 (3rd Cir. 1974), the court held:

> "Our analysis of *this pension agreement* leads us to the firm conclusion that the benefits therein provided are not perquisites of seniority under the Act." (Emphasis added.)

In *Jackson v. Beech Aircraft Corp.,* 517 F.2d 1322 (10th Cir. 1975) the court held:

> ". . . we are of necessity limited to an examination of the agreements from which the benefits arise in our effort to ascertain their true nature." (517 F.2d at 1325.)
>
> * * *
>
> ". . . we . . . are of the view that the retirement income *benefits provided by the plan* are not a form of seniority, as such, but are based on a substantial work requirement." (Emphasis added.) (517 F.2d at 1326.)

And, in *Davis v. Alabama Power Co.,* 383 F.Supp. 880, 889 (N.D. Ala. 1974), *aff'd per curiam,* 542 F.2d 650 (1976), *cert. granted,* No. 76-451, Jan. 10, 1977, the trial court held,

> "This court is of the considered opinion that, as has previously been pointed out, there is no evidence in this case to show that *the pension plan* is based upon any 'unit of work' requirement." (Emphasis added.)

As originally stated, the question presented by this petition and the *Alabama Power* case is:

> "Do the seniority provisions of the Military Selective Service Act require military service to be credited in computing the amount of retirement income under privately funded pension plans *even though under such pension plans the amount of retirement income is dependent upon a substantial work requirement?*"

This issue is squarely before the Court here because it is undisputed that pension benefits are conditioned upon a substantial work requirement (see Ninth Circuit Opinion below, Appendix A to our original petition, page 3, fn. 4). The *Alabama Power* case does not necessarily present the same issue because it may properly be found that the pension plan there does not contain a work requirement. Clearly, if this Court agrees with the finding of the trial court in *Alabama Power* that the agreement creating the pension benefits did not contain any work requirement, *Alabama Power* necessarily will be resolved without ever reaching the question presented by our petition.

We respectfully submit that the two cases are clearly distinguishable on the facts and thus deferral pending decision in *Alabama Power* does not guarantee the resolution of the issue squarely presented by our petition.

There is another reason why the petition should be granted. Within the foreseeable future, say twenty years from now, every employer which has a retirement program will face two payrolls:

the active employees and the retirees. It is at least doubtful that the economy can support this duality of payment no matter how carefully it has been budgeted and pre-planned. It is well-nigh certain that the economy cannot support it if that budgeting and pre-planning is skewed and made meaningless by a proliferation of retirees, not anticipated nor planned for despite a careful review of the existing law, but made eligible only by judicial fiat which upsets or ignores prior settled law.

Dated: San Francisco, California, May 12, 1977.

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